Supreme Court, U. S.
FILED
MAR 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1030

HARRY W. RODGERS, III.,
ERNEST N. CORY, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY MEMORANDUM

A. RAYMOND RANDOLPH, JR.
THOMAS C. GREEN
RICHARD A. KAPLAN
SHARP, RANDOLPH & GREEN
Suite 501
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 659-2400
Attorneys for Petitioner Harry W. Rodgers, III

WM. BRADFORD REYNOLDS
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 331-4100
Attorney for Petitioner Ernest N. Cory, Jr.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1030

HARRY W. RODGERS, III.,
ERNEST N. CORY, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' REPLY MEMORANDUM

---

1. In both this case and *Bulluck* v. *Washington,* 468 F.2d 1122 (D.C. Cir. 1972) (*en banc*), the order granting rehearing *en banc* "did not vacate the judgment of the division" (*ibid.*). The equally-divided *en banc* court in *Bulluck* held that it therefore had no power to alter the outstanding judgment of the panel. But the equally-divided *en banc* court in this case exercised that power by affirming petitioners' convictions although the judgment of the panel had set these aside. We had supposed the conflict between these courts of

appeals was clear and direct, but the government says there is "no merit" to such a view.[1]

According to the government, it matters greatly that the panel in *Bulluck* had affirmed the district court while the panel here had reversed.[2] But to accept that proposition one would have to conclude not only that *Bulluck* does not mean what it holds, but also that an equally-split federal court *has* the power to affect a judgment depending on what the judgment is and who rendered it—a notion totally at odds with a century and a half of federal adjudication.[3]

That history demonstrates one firm principle: no federal court, including an *en banc* court of appeals, has the power to alter an outstanding judgment without a majority vote.[4] The government says its position adheres to that principle because "An equal division of the *en banc* court of appeals means that a majority of the judges to have passed upon the issue (including the district judge) were in agreement with the ruling from which the appeal was taken."[5] But the equal

[1] Brief in Opp., at p. 19 n.12.

[2] *Ibid.* The government's idea apparently is that, despite *Bulluck*, an equally-divided *en banc* District of Columbia Circuit might find the power to affect an unvacated panel's judgment of reversal although the power is absent with respect to a panel's judgment of affirmance. We are left to wonder whether the power would be present or lacking when the panel has affirmed in part and reversed in part, sustaining for example convictions on some counts but reversing convictions on others.

[3] *See* our Petition (No. 79-1030), at pp. 16-18.

[4] As we pointed out in our Petition (79-1030), at pp. 16-17, this is why affirmance by an equally-divided court is merely a declaration of the deadlock, having no precedential value and having the same legal effect as if the proceeding—here the *en banc* rehearing—had never occurred.

[5] Brief in Opp., at p.18.

division means no such thing if, for example, the panel's majority in favor of reversal consisted of a judge sitting by designation, as frequently occurs. In that situation the government's head-count would result in a tie if the vote of the trial judge were given the same weight as a vote of a judge sitting on the court of appeals;[6] on the other hand, if one tallied only the votes of judges who heard the case on appeal, there would be a majority of one for reversal, yet the government would contend that the lower court judgment should be affirmed. Furthermore, when an *en banc* court of appeals splits evenly after a panel including one or two judges sitting by designation unanimously voted to set aside agency action upon direct review, the "majority" of judges who heard the case would favor the panel decision. But under the government's submission, the agency action would be allowed to stand because the panel's judgment was automatically vacated upon the grant of rehearing *en banc*.[7]

It is on this ground—that the grant of rehearing *en banc* "itself vacate[s] the panel decision"[8]—that the government's entire argument rests. It is a ground rejected in *Bulluck*, it has no statutory basis,[9] and the government has offered not a single reason[10] why this

[6] The judge sitting on the court of appeals by designation, who voted opposite of the district judge, would not be a member of the equally-divided *en banc* court of appeals. *See* 28 U.S.C. § 46(c).

[7] Brief in Opp., at pp. 18-19.

[8] Brief in Opp., at p. 18.

[9] *See* 28 U.S.C. § 46(c). The government itself recognizes as much earlier in its Brief in Opposition (see p. 16).

[10] The italicized quotation from Judge Waterman's dissenting opinion in *Farrand Optical Co.* v. *United States*, 317 F.2d 875,

should be the rule except to say that it is so.[11] On the other hand, we have pointed out [12] that a vote to grant rehearing *en banc* cannot also be considered a vote to vacate the panel's judgment, which is essentially a vote on the merits, as this Court recognized in *Moody* v. *Albermarle Paper Co.*, 417 U.S. 622, 627 (1974). Circuit judges in favor of the panel's decision may nevertheless vote for rehearing *en banc*. Indeed, when an equal division results, one can usually assume with assurance that at least one of the judges who made up the majority voting for rehearing *en banc* agreed with the panel's disposition.

In the absence of an announced rule, there is thus no basis to suppose that a majority of the active circuit judges not only voted to grant *en banc* review but also decided to set aside the panel's judgment. The Fourth Circuit, like most of the courts of appeals, has no such rule, its order granting rehearing *en banc* did not va-

886 (2d Cir. 1972), at p. 18 of the government's Brief in Opposition, says only that it is "obvious" that a grant of rehearing *en banc* has this result.

[11] The government states (Brief in Opp. p. 17 n.11) that in light of his dissenting opinion in *Drake Bakeries, Inc.* v. *Local 50*, 294 F.2d 399 (2d Cir. 1961), *aff'd on other grounds*, 370 U.S. 254 (1962), when the equally-divided *en banc* court, by a 4-2 vote, affirmed the district court rather than the panel, and his silence when a somewhat different result occurred in *Farrand Optical* v. *United States, supra*, Judge Friendly must have changed his view concerning the effect of a tie vote. We think this demonstrates only that Judge Friendly decided to adhere to the principle of *stare decisis*, particularly since the deadlocked *en banc* court in *Farrand Optical* sent the case back to the court of appeals panel to consider the appellate issues it had not reached in its original decision.

[12] *See* Petition (No. 79-1030), at p. 18.

cate the panel's decision and its tie vote therefore could not affect that decision, which should have been affirmed.

2. Insofar as the government's case against these petitioners depended upon non-disclosure of certain beneficial owners of Marlboro Racetrack, we have previously explained our legal position that petitioners did not thereby violate the mail fraud statute. Petition (79-1030), at pp. 19-26. Instead of addressing the fundamental statutory construction question raised in our petition, the government recounts the evidence in an attempt to make it appear that the statutory issue is not properly presented.

With respect to these petitioners, however, the mail fraud issue cannot be dismissed as nothing but a factual dispute about the weight of the evidence. The evidence relating to this issue is not in dispute. As the Government points out, petitioner Cory withheld from the State Racing Commission the identities of Hess, Kovens and the Rodgers brothers as beneficial owners (Brief in Opp., at pp. 7, 33-34). It is not disputed that he did so intentionally in responding to official inquiries about the beneficial ownership of Marlboro Racetrack (Brief in Opp. at p. 34). In fact, petitioner Cory explicitly advised Racing Commissioner Jackson that he could not disclose the ownership interests of his clients because of ethical constraints imposed on him by the attorney-client relationship (Tr. 6205-07). He thus reported these ownership interests in the names of nominees, including himself as "Attorney," Petition (79-1030), at p. 20, with the affirmative representation that none of the beneficial owners of Marlboro Racetrack was involved in a criminal enterprise or book-

making (*id.* at 21). Not only was this the standard reporting practice that had long been acceptable to the Maryland State Racing Commission (*id.* at 21-22), but the Attorney General of the State had advised the Racing Commissioner not to insist on further disclosure from petitioner Cory in light of the attorney-client relationship (Tr. 6207).

It is not a sufficient answer in these circumstances for the government to assert simply that there was intentional concealment of information in response to official inquiries. That is conceded. However, the court of appeals in *United States* v. *Rabbit,* 583 F.2d 1014, 1024 (8th Cir. 1978), clearly held that purposeful nondisclosure was not reachable under the mail fraud statute when the individual withholding information was under no affirmative duty to disclose.[13] And that, we submit, was the situation here. Petition (79-1030), at pp. 23-25. Indeed, not only was there no affirmative disclosure obligation, but also well-recognized ethical constraints inherent in the attorney-client relationship between petitioner Cory and the beneficial owners he represented counselled against revealing their identities. To hold that such conduct violates the mail fraud statute extends that criminal provision well beyond any recognized bounds of statutory construction and thus demands the attention of this Court.

3. Because the trial judge gave an instruction on bribery with respect to two of the racketeering counts (Counts 21 and 23), the government argues that the

[13] A majority of this Court has recently recognized the importance in a criminal context of establishing an affirmative duty to disclose when the prosecution for fraud rests on evidence of nondisclosure. *Chiavella* v. *United States,* No. 78-1202, 48 L.W. 4250 (March 18, 1980).

failure to include a bribery instruction in connection with the mail fraud counts is of no material consequence (Brief in Opp., at pp. 24-27). Insofar as petitioners Rodgers and Cory are concerned, this position is untenable.

Neither of these petitioners was indicted under Count 21, and petitioner Cory was also *not* indicted under Count 23.[14] In its instructions, the district court explicitly advised the jury that the charges given on Counts 21 and 23 were meant to refer only to the defendants named in those counts (Tr. 11481-82). There is thus nothing to the government's argument that the bribery instruction in connection with the two racketeering counts was readily transferable (albeit *sub silento*) to the mail fraud counts on which these petitioners were indicted.

Rather, in the circumstances of this case, the failure to give a separate bribery instruction under the mail fraud counts was clear error in regard to these petitioners. As the government acknowledges, the theory of the mail fraud prosecution "*included* bribery as one of the ways in which fraud was committed" (Brief in Opp., at pp. 25-26 n.19; emphasis in original). Thus, at least with respect to one of the two theories advanced by the prosecution, bribery was treated as an element of the mail fraud offense.[15] As such, the district court was under an affirmative obligation to include an in-

[14] While petitioner Rodgers was indicted under Count 23, the district court entered a judgment of acquittal on this count. Petition (79-1028) App. 18a-19a n.3.

[15] *See United States* v. *Mandel,* 591 F.2d 1347, 1365 (1979); *see* also Judge Widener's dissent below on rehearing *en banc* at 79-1028 Pet. App. 5a-8a.

struction on bribery in its mail fraud charge even if not requested to do so. *E.g., United States* v. *Schmidt,* 376 F.2d 751 (4th Cir.), *certiorari denied,* 389 U.S. 884 (1967). When, as here, such a request *was made* by the defendants, the failure to give the instruction is reversible error. *See* Judge Widener's dissent below on rehearing *en banc* at Petition (79-1028) App. 8a-9a, and the cases there cited.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A. RAYMOND RANDOLPH, JR.
THOMAS C. GREEN
RICHARD A. KAPLAN
SHARP, RANDOLPH & GREEN
Suite 501
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 659-2400

Attorneys for Petitioner
Harry W. Rodgers, III

WM. BRADFORD REYNOLDS
SHAW, PITTMAN, POTTS &
TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 331-4100

Attorney for Petitioner
Ernest N. Cory, Jr.

March 1980

see 7028 7029 7030